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JAMES R. BROWNI

No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1959

WILBUR J. SMITH; LONGVIEW TUGBOAT COMPANY, a Washington corporation; ELMER DANIELSEN, dba Puget Island Ferry; ESSON H. SMITH, dba C. T. SMITH & SON, **Appellants,**

vs.

COLUMBIA COUNTY, OREGON, and M. R. CALHOUN as Sheriff of Columbia County; MARION COUNTY, OREGON, and DENVER YOUNG as Sheriff of Marion County; YAMHILL COUNTY, OREGON, and W. J. "BILL" JONES as Sheriff of Yamhill County; MULTNOMAH COUNTY, OREGON, and TERRY D. SCHRUNK as Sheriff of Multnomah County; CLACKAMAS COUNTY, OREGON, and FRED REAKSECKER as Sheriff of Clackamas County; CLATSOP COUNTY, OREGON, and PAUL KEARNEY as Sheriff of Clatsop County; WASCO COUNTY, OREGON, and HAROLD SEXTON as Sheriff of Wasco County; HOOD RIVER COUNTY, OREGON, and RUPERT L. GILLMOUTHE as Sheriff of Hood River County; CARL W. CHAMBERS, ROBERT D. MacLEAN and RAY SMITH, constituting the State Tax Commission of the State of Oregon, **Appellees.**

On Appeal from the Supreme Court of the State of Oregon.

MOTION TO AFFIRM OR DISMISS

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On Appeal from the Supreme Court of the State of Oregon.

MOTION TO AFFIRM OR DISMISS

Appellees in the above-entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the decree of the Supreme Court of the State of Oregon be affirmed, or in the alternative, that the appeal from such decree be dismissed, on either or both of the following grounds:

1. The Notice of Appeal does not comply with Rule 10 of the Rules of this Court;

2. The appeal does not present a substantial federal question.

OPINION BELOW

The Oregon Supreme Court opinion is reported at 68 Or. Adv. 1071, 341 P.(2d) 540 (1959). Copies of that opinion and of the unreported opinion of the trial court and the respective decrees are contained in Appendix A to Appellants' Jurisdictional Statement, beginning at p. 23.

JURISDICTION

Appellees object to jurisdiction on the ground that the Notice of Appeal does not comply with Rule 10 of the Rules of this Court in that Notice does not specify the statute under which the Appeal to the Court is taken, as required by subparagraph 2(a) of said Rule 10. That Rule provides in part:

> "2. The notice of appeal . . . shall specify the statute under which the appeal to this court is taken. . . . A failure to comply with these requirements will be a sufficient reason for dismissing the appeal."

QUESTIONS PRESENTED

Without quoting the alleged questions set forth in Appellants' Notice of Appeal and Jurisdictional Statement, appellees believe the questions can be stated more simply as follows:

1. Does the Commerce Clause of the United States Constitution prohibit the State of Oregon from imposing

an ad valorem tax upon the properties of appellants used in intrastate and/or interstate commerce on the Columbia River?

2. Does the Oregon Admission Act prohibit such taxation?

3. Does the Oregon Admission Act, taken as an exercise of the power of Congress to regulate interstate commerce, prohibit such taxation because appellants' properties fall into that class of properties centrally assessed by the Oregon State Tax Commission (rather than assessed at the county level), which class includes, among others, properties of water transportation companies "engaged in the business of transporting freight or passengers for hire upon the rivers in or adjoining the State of Oregon"?

4. Does the Commerce Clause, either alone or augmented by the Oregon Admission Act, prohibit such taxation because other watercraft separately classified by the Oregon legislature are taxable in Oregon on lesser percentages of true cash value than are appellants' properties?

5. Does the equal protection clause of the Fourteenth Amendment, considered alone or in connection with the Commerce Clause of the United States Constitution, prohibit such taxation?

Subsidiary questions or questions inherent in the foregoing questions are: (1) Is the Oregon tax an ad valorem property tax or a tax upon the use of the waters of the Columbia River; and (2) does the Oregon Admission Act preclude classification, for Oregon ad valorem tax

purposes, of watercraft that may travel in interstate commerce upon the Columbia River and/or upon rivers within the State of Oregon?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellants have set forth satisfactorily the applicable statutes in Appendix B of their Jurisdictional Statement, p. 63, except for their citation of the Privileges and Immunities portion of Amendment XIV, § 1, U. S. Constitution. Their claim is a violation of the Equal Protection Clause, and the quotation should read:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is an appeal by certain water transportation companies from the decree of the Supreme Court of the State of Oregon, entered July 17, 1959, affirming the decree of the Circuit Court of the State of Oregon for the County of Marion holding that § 110-505, O.C.L.A., as amended by Or. Laws 1949, c. 414, sec. 1, making it a duty of the Oregon State Tax Commission

> "To make an annual assessment, upon an assessment roll to be prepared by said commission, of the property having a situs in this state, as hereinafter defined, of all * * * water transportation companies engaged in the business of transporting freight or passengers for hire upon the rivers in or adjoining the State of Oregon."

did not violate either the Fourteenth Amendment to the U. S. Constitution, or paragraph 3, § 8, Art. I, of

the U. S. Constitution, or § 2 of the Oregon Admission Act (11 Stat. 383), or the uniformity provisions of the Oregon Constitution (Art. I, § 32, and § 1, Art. IX). Other Oregon statutes supplemental to the one above-quoted also were held valid.

The statutes under attack and the facts of the case involve the year 1950 only, inasmuch as the 1951 Oregon legislature again amended § 110-505, O.C.L.A., effective for 1951, to change the description to:

> " . . . water transportation upon inland waters of the State of Oregon including interstate rivers and standing waters, and tide water extending to the ocean bar, but not when incidental to transportation upon the high seas; . . ." (Or Laws 1951, c. 586, § 2)

Appellants are, respectively, a Washington corporation, a Washington resident, and an alleged Washington resident whose residency, although contested, was not determined by either the Oregon Circuit Court or Supreme Court because held to be immaterial.

All appellants operated between Oregon and Washington on the Columbia River, with some companies also operating between Oregon points and between Washington points on the Columbia and on its tributaries within one state or the other. The appellants variously maintain offices, moorage and repair facilities on either the Oregon or the Washington side, or both. Use of the vessels and facilities is with "consistent regularity . . ., throughout the calendar year although not on a regularly defined schadule, and con-

stitute(s) a necessary and integral part of their business. . . ."

The 1949 amendment to § 110-505, O.C.L.A., added the above-described companies to those companies whose properties having a situs in Oregon already were assessed by the Oregon State Tax Commission. This group of companies includes railroads, airlines, telephone and telegraph, gas, water, and electric companies, and others determined by the legislature as best assessed by a central assessing agency rather than assessed piecemeal by the various county assessors. Such central assessment is a common characteristic of state government. The State Tax Commission generally (1) determines the true cash value of the properties of the company, valued as a "system" or "unit"; (2) determines the portion of the properties allocable to Oregon and assessable by Oregon; (3) apportions the Oregon portion of the properties to the proper Oregon counties; (4) prepares an assessment roll showing the foregoing, reviews the roll by statutory procedure, and certifies the values to the various counties. The assessors then enter their proportionate share of the value on their respective county assessment rolls and allocate the values to the taxing districts within the county. Taxes then are levied on the assessed values in the same manner and at the same time as taxes on other properties are levied, and collections generally are made by the same officers and at the same time as they are for other ad valorem taxes.

Prior to 1949, the State of Oregon historically had classified separately for purposes of ad valorem taxation

certain ships and vessels.[1] All watercraft not specifically exempt, whether or not given special treatment in the way of partial exemption, were subject to assessment by the local county assessor if they had tax situs in Oregon. As of January 1, 1950, ships and vessels whose home ports of registry and enrollment were in the State of Oregon were assessed at 10 percent of true cash value; ships and vessels in intercoastal or foreign trade were assessed at 1 percent of true cash value;[2] and pleasure boats 16 feet and over in length were licensed

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[1] Article IX, § 1b, Oregon Constitution, expiring on January 1, 1935, provided for almost complete exemption of ships and vessels of 50 tons or more capacity, engaged in passenger and freight coasting or foreign trade, whose home ports of registration were in Oregon. Legislative partial exemption of ocean-going vessels dates from 1925 (Chapter 258, Gen. Laws of Or. 1925) with various modifications thereafter.

[2] Section 110-313, O.C.L.A., as amended by Or. Laws 1949, c. 405, § 2, reads in part as follows:

"1. Except as otherwise provided by law, all ships and vessels whose home ports of registry or enrolment are in the state of Oregon, other than such as are assessed by the state tax commission, shall be assessed at 10 per cent of the true cash value thereof; provided, however, that ships and vessels in intercoastal or foreign trade, whether actually engaged therein or laid up, shall be assessed at 1 per cent of the true cash value thereof; and provided further, that to and including the year 1951 the same rule of 1 per cent shall apply to ships and vessels which may be under original construction at the assessment date of any year, but such rule shall not apply to materials not actually in place as the constructed part of any such ship or vessel.

"2. Notwithstanding the provisions of subsection 1 of this section, any ship, vessel or other watercraft which, on or subsequent to the tax day of any year, shall be docked or moored in any waters subject to the jurisdiction of the state of Oregon, and which shall be employed or used as a plant for the reduction or processing but excluding canning, of deep-sea fish, shall be assessed and taxed in the manner hereinafter provided. . . ."

in lieu of taxation.[3] The alleged discrimination consists of the fact that the *Oregon portion* of appellants' properties found to have a tax situs in Oregon is placed on the Oregon State Tax Commission's assessment rolls at full true cash value and apportioned to the counties where the individual assessor places his county's share on the county roll at the current county ratio; whereas 10 percent or 1 percent, respectively, of the full true cash value of a vessel registered in Oregon or engaged in intercoastal trade is placed on the county assessment roll.[4] There is no difference in the millage levy against such property falling in the same taxing district or districts.

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[3] Or. Laws 1945, c. 181, provided in sections 1 and 8 as follows:

"It shall be the duty of each owner of every pleasure boat 16 feet or more in length and kept in the state of Oregon, or any of the waters thereof, including any waters over which said state shall have joint or concurrent jurisdiction, to register said boat with the county clerk of the county within which said boat is kept, and secure from said county clerk an annual license for said boat as in this act provided."

"The license fees imposed by this act upon pleasure boats and upon the owners thereof by reason of such ownership, shall be in lieu of all other taxes and licenses to which such boats, or the owners thereof, by reason of such ownership, may be subject."

[4] For example, the State Tax Commission's assessment rolls, a public record, show the true cash value of the properties of Wilbur J. Smith, taxable in Oregon as of January 1, 1950 (after application of a 19.6 percent allocation factor as Oregon's share), to be $53,298. This value was apportioned between six counties which applied individual county ratios ranging from 44 percent to 61 percent to arrive at a total assessed value of $27,306.18. A hypothetical ship registered in Clatsop County, Oregon, as of January 1, 1950, with a true cash value of $53,298, would be assessed at 10 percent, or $5,330. A hypothetical ocean-going vessel with the same true cash value would be assessed at $530. A pleasure boat valued at $53,000 would pay a license fee to the county where the boat was kept, according to its length, but would pay no ad valorem taxes.

All ships or vessels not given special treatment are assessed the same as other personal property in the county of situs and their true cash value taxed the same as appellants' by application of the county ratio and applicable millage rate or rates. The record is silent as to the methods of valuation employed by the State Tax Commission.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Oregon Tax under Attack Is a Property Tax, and the Operating Incident of the Tax Is Situs and Not Interstate Commerce.

Appellants, by the ingenious, but at times illusive use of language, have lifted that portion of the laws enacted by the 1949 Oregon Legislative Assembly which subjects their property to assessment by the Oregon State Tax Commission out of the context of the Oregon property tax picture to raise the spectre of illegal taxation under the Commerce Clause and/or the Oregon Admission Act. They do this primarily by using the descriptive language of

> ". . . water transportation companies engaged in the business of transporting freight or passengers for hire upon the rivers in or adjoining the state of Oregon."

to fabricate the argument that the "operating incident of the Oregon tax is based on interstate commerce."

The Jurisdictional Statement intimates that in 1949 Oregon enacted a new tax, singling out the above described companies for the levy of a state-level tax (Juris. State., p. 57). Any such intimation is untrue. The true effect of the 1949 legislation was to place appellants' properties upon the same tax basis as the preponderance of property in Oregon.

All property not otherwise exempt from ad valorem taxation is subject to assessment and taxation in Oregon in equal and ratable proportion. Section 110-101, O.C.L.A. (Juris. State., p. 72). This includes all chattels

and movables such as boats and vessels. Section 110-103, O.C.L.A. (Juris. State., p. 72). *This means that properties of appellants which develop situs in Oregon would have been subject to ad valorem taxation on the same basis as any other similar properties in Oregon if the Oregon legislature had not enacted the 1949 amendments now under attack.* By "the same basis" is meant appraisal for value on the assessment roll by the county assessor in the county of situs, an entering of the property on the assessment roll by the assessor, the extension against the property of the tax levies of the various taxing districts within which the property had a situs on January 1, the assessment date, and collection of taxes. Under this scheme of ad valorem taxation, ancient and commonplace, appellants' tangible properties would be subject to taxation under Oregon Law.

The enactment of the 1949 laws now under attack continue tax liability with certain modifications. The first obvious modification was that any watercraft of appellants formerly falling into any of the partially exempt classes discussed, *supra,* were restored to the general class of property subject to assessment at full true cash value—the class constituting the overwhelming preponderance of tangible property in the State. In other words, appellants are claiming the right to partial or complete exemption by complaining about the narrowing of the class of partially exempt watercraft and their ejection from this class into equal and ratable taxation with the great bulk of property owners in Oregon.

Another modification, mentioned several times, is that

the appraising authority was changed to the Oregon State Tax Commission. The function of the Commission is solely one of assessment. The Commission must determine the value of certain properties belonging to certain companies. These companies must be described with particularity so that the Commission and the local county assessors know with reasonable certainty where to draw the line as to assessment duties. The 1949 language described appellants with particularity. An immediate effect of the description was that the certainty of actually taxing appellants' properties was increased manifoldly. Instead of potential conflicts or uncertainties between assessors as to which county had situs on January 1, the assessment date, and uncertainties as to whether or not the property even had to be reported by appellants as subject to taxation in Oregon, appellants were required to report their properties each year to the Commission for determination of situs and valuation.

Another modification was in methods of valuation. The record is silent as to administrative practice,[9] and the case was submitted to the Oregon courts solely as an attack upon the methods authorized by statute. The principal attack in the Oregon courts laid emphasis upon the contention that the statutes of Oregon attempted to lay a tax upon the entire business of the companies, whereas the vessels only of the private carriers and of

[9] The only exhibits entered in the trial court related to the movement of vessels on the Columbia River and its tributaries, or constituted reports to the Public Utilities Commissioner for the State of Oregon and to the State Tax Commission, giving various information as to the properties, revenues and expenses of appellants.

others operating on the coast and in foreign trade were taxed. In their "equal protection" argument, appellants claimed that *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L.Ed. 585, was not determinative because there the elements of discrimination alleged in the instant case were absent, to wit: (1) discrimination based on appellants' being taxed on their "entire business" and (2) discrimination because of the aforedescribed classification of watercraft and taxation of different proportions of total true cash value. In their "burden on interstate commerce" argument, appellants argued that the reporting of gross receipts and net earnings to the Commission under section 110-510, O.C.L.A. (Juris. State., pp. 68, 69), and the discretionary use of such information in the determination of true cash value under section 110-512, O.C.L.A. (Juris. State., pp. 70, 71), showed beyond question that the tax was in reality an excise or privilege tax upon interstate commerce.

The Oregon Supreme Court noted that section 110-512, O.C.L.A. "only states that the tax commission 'may take into consideration' the information required to be furnished," and held:

> "We hold that the furnishing of such information was for the sole purpose of enabling the commission to determine the true cash value of property within this state and for no other purpose. Since there is nothing in the record to indicate that the Tax Commission followed any system that, in fact, resulted in taxing property outside the state, it follows that the right to engage in interstate commerce was not here taxed, so far as we can determine."[9]

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[9] *Smith v. Columbia County*, 68 Or. Adv. 1071, 1094

Another alleged modification is the contention of appellants that now they are taxed not only upon their tangible property, but also upon their intangibles. Appellees perhaps err in saying "contention" since Appellants' Jurisdictional Statement, p. 7, states authoritatively:

> "Also, it is mandatory that the state impose a tax upon the franchises and special franchises of such companies, regardless of whether those franchises or special franchises authorize the conduct of interstate business."

While, on the one hand, section 110-543, O.C.L.A. (Juris. State., pp. 64, 65) defines "property" as including tangible and intangible property, and all franchises and special franchises, and section 110-505, O.C.L.A., as amended by Or. Laws 1949, c. 414, (Juris. State., p. 67) makes it a duty of the State Tax Commission to assess "the property having a situs in this state" of appellants, on the other hand, section 110-512, O.C.L.A. (Juris, State., p. 70) states that the reports, statements or returns of the companies, the earning power of the companies, *"the franchises and special franchises owned or used by said company,* and such other evidence of any kind as may be obtainable . . ." *may be taken into consideration* in determining true cash value of the properties of the companies. The Oregon Supreme Court, in its opinion stated:

> "But plaintiffs say that because their franchises are taxed, the rights to the use of the river are also taxed. As previously pointed out, plaintiffs make a wrong assumption. The tax commission is not required to tax franchises, but 'may' consider the same for the

purpose of arriving at the proportionate value of its property in Oregon in the same way that consideration of income may to some extent be some evidence of the actual value of the thing from which income is derived."[©]

While appellees are fully cognizant that this Court is not limited by state characterization of a tax and has a duty to consider the real nature of the tax and the effect on the federal right asserted, *Society for Sav. of Cleveland v. Bowers*, 349 U.S. 143, 75 S.Ct. 607, 99 L.Ed. 950 (1955), *Railway Express Company v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed. (2d) 450 (1959), the holding of the Oregon Supreme Court goes further than a mere characterization and constitutes a binding construction of the state statutes as to what property of appellants is taxable under the Oregon law. However, assuming that the earning power, special franchises and franchises are used in determining value, such use has long been approved by this Court. This Court in the *Railway Express Company* case, *supra*, commented that Virginia's tax structure empowered local governments to levy ad valorem taxes on the "dead" value of real and tangible personal property, leaving to the state the taxation of rolling stock, money and other intangibles, and the "live" or "going concern" value of the business in Virginia. Oregon local government likewise levies ad valorem taxes on the "dead" value of real and tangible personal property, but also levies the same taxes on its apportioned part of the "live" value of the properties of those companies described in section 110-505, O.C.L.A.

[©] *Ibid*, p. 1095

(Juris. State., p. 67). The *Railway Express Company* opinion cited some seven United States Supreme Court decisions affirming the right of a state to tax "going concern" value, where a company might be engaged in interstate commerce.

At this point consider appellants' statement that:

> "Property of the covered water transportation companies is not subjected to the tax unless used in the business of transporting freight or passengers for hire upon the rivers in or adjoining the State of Oregon." (Juris. State., p. 16)

The only tax under consideration is not some type of state-level tax directed against appellants, separate and apart from the state-wide ad valorem system of taxation. Use of the property in the business is not the condition precedent to being taxed. *The operating incident is in all cases the situs of taxable property within the State of Oregon.* A $10,000 building owned by one of the appellants in Multnomah County, Oregon, but not used in the water transportation business, is subject to the same taxes as the $10,000 (apportioned to Multnomah County, Oregon) of the total value of the property used in the business.

The foregoing should indicate to this Court that the characterization by appellants of the Oregon tax as having as its operating incident travel in interstate commerce is without basis, and that the tax is a property tax, pure and simple.

B. Prohibition of a Property Tax by the Commerce Clause and/or the Oregon Admission Act.

Not all of appellants' operations, nor all of the opera-

tions of other companies centrally assessed by the Oregon State Tax Commission fall exclusively within interstate operation or intrastate operation. Appellees believe there is no particular advantage or disadvantage to Oregon either way, so long as the property has a situs in the state.

If the party does travel in interstate commerce, *Ott v. Mississippi Valley Barge Line*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949), would seem to be conclusive authority for the proposition that a tax fairly apportioned to the commerce carried on within the state does not violate the Due Process Clause or the Commerce Clause. See also, *Railway Express Company v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed. (2d) 450 (1959). In the instant case, there is no contention that the tax is not fairly apportioned. This leaves appellants asserting that the Commerce Clause, either by itself or with the Oregon Admission Act, prohibits the apportioned ad valorem taxation of property engaged in interstate commerce or intrastate commerce, or both.

With respect to the travel in interstate commerce, this Court in *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed. (2d) 421 (1959), said:

> "While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."

While this comment was made in connection with income tax cases, it is certainly applicable to the almost inherent right of property taxation by a state.

With respect to travel in intrastate commerce, to appellees' knowledge there has been no United States Supreme Court decision construing the Commerce Clause as prohibiting state ad valorem taxation of mobile property engaged in intrastate commerce. It is well recognized that the Commerce Clause carries with it the right to regulate navigable waters, whether they form a part of the state boundary or are within the state. *Economy Light & Power Co. v. United States,* 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921). But this right has never been interpreted to mean prohibition of property taxation within the state.

Does the addition of the Oregon Admission Act supply the magical element that destroys the state's right to levy property taxes in these situations? We concede that the pertinent portion of that Act relied on by appellants has to do with the regulation of commerce on navigable waters bordering on or in the state. But if the statute derives its life from the Commerce Clause, like the water it governs, it can rise to no higher level than its source. It must mean or be construed to apply to the regulation of commerce and nothing else. The significance of the movement of appellants' properties on navigable waters has no bearing upon imposition of a property tax except to determine whether and where the property had situs on the assessment date. The Oregon tax does not regulate either interstate or intra-

state navigation. Appellants have conceded before the Oregon Supreme Court that their commerce is unimpeded. That Court's opinion states that "No one here contends that plaintiffs must, under this statute involved, pay their taxes before any use is made of the river," and "In fact, plaintiffs, at page 39 of their brief, concede that they have not yet been denied the right to the use of the river."[9]

Appellants shrug aside the Oregon Supreme Court's reading of the Oregon Admission Act as a limitation only on the right to travel without the imposition of a tax, duty, impost or toll therefor as a condition or charge for such privilege. However, appellants have nothing to offer this Court in support of the contrary except the erroneous proposition of the operating incidence of the tax being based on interstate commerce. Once this falls, appellants may have a *novel* federal question, but one hardly *substantial* enough to warrant this Court's time in oral argument.

Completely overlooked by appellants is the consideration that the Oregon Admission Act may have been an expression of congressional protection over commerce *preceding* a similar protection arrived at by judicial construction of the Commerce Clause. There is no substantial difference between the protection afforded by *Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), against the imposition of a charge for the privilege of engaging exclusively in interstate commerce, and the Oregon Admission Act,

[9] *Smith v. Columbia County*, 68 Or. Adv. 1071, 1095

which protects against charges for travel on navigable waters. The fact that the latter covers intrastate waters as well is no point of distinction, since such coverage is only a part of the overall power of Congress to regulate commerce, just as the regulation of interstate commerce does not describe the whole power to regulate commerce.

C. Discrimination under the Equal Protection Clause.

Appellees rely upon the holding of the Oregon Supreme Court and the cases cited and discussed therein, as supporting their contention that appellants here raise no substantial federal question. Our Supreme Court has construed the uniformity provisions of the Oregon Constitution to be "equal protection" clauses, subject to the same tests as applied under the federal Fourteenth Amendment.[9] Therefore, our State Supreme Court has particular reason to rely upon the cases and interpretations of this Court in its own cases; and the citation of its own cases may be said to be based upon the rules laid down by this Court.

Sufficient has been indicated under our STATEMENT, *supra*, pp. 4–9, to show the classification existing in 1950, in Oregon, relating to watercraft. The powerful effect of the type and location of the activity, the economic situation involved, are inescapable in analyzing the probable motivations for the classification. Suffice it to say, appellees believe appellants cannot present a substantial federal question on the basis of the statutes themselves.

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[9] *Standard Lbr. Co. v. Pierce et al.*, 112 Or. 314, 228 Pac. 812 (1924)

(By this we do not intimate that testimony would show other than a sustainable system of classification.)

D. Discrimination under the Equal Protection and Commerce Clauses.

There is a serious question as to whether the question posed by appellants here was properly raised or expressly passed upon by the Oregon Supreme Court. A reading of the opinion of the Oregon Supreme Court indicates, first, that this contention was not listed on page 1083 of the opinion (Juris. State., p. 43) as one being made by appellants, and, second, that no holding was expressly made by said Court. Appellants admit as much on page 21 of their Jurisdictional Statement where they say:

> "The tax differences outlined above [classification of watercraft] are recognized by the Oregon Supreme Court in its lengthy discussion of permitted classification under the Equal Protection Clause of the 14th Amendment. However, the Oregon Court does not consider the possibility that such differences may constitute discrimination prohibited by the Commerce Clause and the Admission Proviso."

Such a possibility was not considered because not presented by the attorneys who handled the case in the Oregon courts.

Assuming the Court disagrees with this ground for dismissal, appellees still contend that no substantial federal question is presented. In order to show that classification, otherwise reasonable and not arbitrary under the Equal Protection Clause, constitutes a burden on interstate commerce, the alleged discrimination would have to impede or hamper the interstate activity (or

the intrastate activity, under appellants' theory of the extension of the Oregon Admission Act into regulation of intrastate waters). Since appellants have submitted no evidence of actual discrimination, the violation of the Commerce Clause must be found on the face of the statutes.

It must be remembered that the watercraft assessable at one percent or ten percent of true cash value are also in intrastate, interstate and in foreign commerce. Also, that within the classification into which appellants fit, the members of the class are all treated alike. With respect to the assessment of ocean-going vessels, this Court stated in *Ott v. Mississippi Valley Barge Line, supra;*

> "We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters."

The reason for this statement appears based upon the fact that prior decisions of this Court had not dealt with the possibility of apportioned taxation by a state of such ocean-going vessels. If anything is invalid, it might be the attempt even to partially tax the ocean-going vessels, rather than the attempt to tax appellants' properties at full value. On the other hand, the one percent and ten percent rules might be legislative rules of apportionment clearly reasonable when applied to those vessels which had established a tax situs in Oregon. A vessel registered or enrolled in Oregon might well spend ten percent of its time in Oregon; whereas a vessel in intercoastal or foreign trade might well spend only one percent of its time in Oregon.

With respect to competition between water transportation companies, appellants cannot claim discrimination because they are all treated alike. Therefore, any one of appellants is not put at a commercial disadvantage with any other in its class, and no undue burden is placed upon its operation. Not only is this true with respect to water transportation, but with respect to the competitive advantages and disadvantages of the appellants as compared with other forms of transportation. In 1949, railroads and airlines were already within the class of properties to be assessed by the Oregon State Tax Commission, and elimination of appellants from the effect of the 1949 statutes now under attack would only serve to create discrimination amounting to an interstate-commercial disadvantage to the railroads and airlines.

CONCLUSION

To make out a case based on a substantial federal question, appellants must turn an obvious ad valorem tax into a tax upon the privilege of engaging in commerce on the navigable waters in and adjacent to the State of Oregon. We urge that they have not succeeded. They must show that a property tax imposes a burden on congressionally regulated commerce because it taxes intangibles or because it contains classifications having unreasonable bases in location of the property, economic and physical activities, and the like. We believe the Supreme Court of Oregon has answered the former, and

that appellants have failed to show the latter. Indeed, there is greater room for argument that the Oregon legislature has restored uniformity of treatment of the property engaged in interstate commerce. Appellants must construe the Oregon Admission Act as extending beyond the regulation of navigation and show an interference with navigation on the face of the Oregon statutes. We submit they have failed here, too. Appellants clearly have failed to show violations of the Commerce Clause or the Equal Protection Clause, when each is considered alone. Appellees request affirmance of decree and opinion of the Oregon Supreme Court, or dismissal of the appeal, whichever the Court deems applicable.

Respectfully submitted,

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